LIBRARY
SUPREME COURT, U. S.

FILED
AUG 31 1961
JAMES R. BROWNING, Clerk

No. 195

In the Supreme Court of the United States

OCTOBER TERM, 1961

A. C. WILLINGHAM, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LOUIS F. OBERDORFER,
Assistant Attorney General,

MEYER ROTHWACKS,
KENNETH E. LEVIN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	5
Argument	8
Conclusion	13

CITATIONS

Cases:

Claassen v. *United States*, 142 U.S. 140	12
Elwert v. *United States*, 231 F. 2d 928	12
Goo v. *United States*, 187 F. 2d 62, certiorari denied, 341 U.S. 916	12
Hirabayashi v. *United States*, 320 U.S. 81	12
Koontz v. *United States*, 277 F. 2d 53	8
Libson Shops, Inc. v. *Koehler*, 353 U.S. 382	9, 10
Manning v. *Seeley Tube & Box Co.*, 338 U.S. 561	12
New Colonial Co. v. *Helvering*, 292 U.S. 435	10
Spies v. *United States*, 317 U.S. 492	12
United States v. *Tusan*, decided September 4, 1952 (S.D. Calif.)	12

Statutes:

Internal Revenue Code of 1939:

Sec. 23 (26 U.S.C. 1952 ed., Sec. 23)	2-3
Sec. 122(b) (26 U.S.C. 1952 ed., Sec. 122 (b))	3, 8, 9
Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145 (b))	4, 8, 12
Sec. 275(a) (26 U.S.C. 1952 ed., Sec. 275 (a))	11
Sec. 322(b)(1) (26 U.S.C. 1952 ed., Sec. 322 (b)(1))	11

Statutes—Continued

Page

Internal Revenue Code of 1954:

Sec. 172 (26 U.S.C. 172) 4-5
Sec. 381 (26 U.S.C. 381) 10
Sec. 382 (26 U.S.C. 382) 10
Sec. 6501(a) (26 U.S.C. 6501(a)) 11
Sec. 6511(a) (26 U.S.C. 6511(a)) 11

Miscellaneous:

H. Rep. No. 1337, 83d Cong., 2d Sess. (3 U.S.C. Cong. & Adm. News 4017 (1954)) 10
H. (Conf.) Rep. No. 2543, 83d Cong., 2d Sess. (3 U.S.C. Cong. & Adm. News 5280 (1954)) 10
S. Rep. No. 1622, 83d Cong., 2d Sess. (3 U.S.C. Cong. & Adm. News 4621 (1954)) 10

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 195

A. C. WILLINGHAM, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. The opinion of the court of appeals (Pet. App. 21-32) is reported at 289 F. 2d 283.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1961. (Pet. App. 33.) Petition for rehearing was denied on June 2, 1961. (Pet. App. 35.) The petition for a writ of certiorari was filed on June 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The Court of Appeals affirmed the conviction of petitioner, president and sole stockholder of Gulf Southwestern Transportation Company, for wilfully attempting to evade corporate income taxes for 1952 and 1953 by a series of fictitious book entries. Petitioner contends that the conviction should be reversed for the reason that the corporation is allegedly entitled to certain net operating loss carry-over and carry-back deductions in the prosecution years which would allegedly offset any actual deficiencies for those years. The questions presented are:

1. Whether losses suffered by a corporation prior to reorganization may be included in a loss carry-over deduction of the corporation after reorganization in order to wipe out corporate deficiencies for the prosecution years, and thereby vitiate conviction of the president of the corporation for wilfully attempted evasion of corporate income taxes.

2. Whether the fact that losses by the corporation may be included in a loss carry-back deduction in order to wipe out corporate deficiencies for one of the prosecution years vitiates the conviction of the president of the corporation for wilfully attempted evasion of corporate income taxes for that year.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * *

(s) [As added by Sec. 211(a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 122 [As added by Sec. 211(b), Revenue Act of 1939, *supra*]. NET OPERATING LOSS DEDUCTION.

* * * *

(b) [As amended by Sec. 215(a), Revenue Act of 1950, c. 994, 64 Stat. 906] *Amount of Carry-Back and Carry-Over.*—

* * * *

(2) *Net operating loss carry-over.*—

* * * *

(B) *Loss for Taxable Year Beginning After 1949.*—If for any taxable year beginning after December 31, 1949, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the five succeeding taxable years * * *.

* * * *

(C) [As amended by Sec. 330(b), Revenue Act of 1951, c. 521, 65 Stat. 452] *Loss for Taxable Year Beginning After December 31, 1947, and Before January 1, 1950.*—If for any taxable year beginning after December 31, 1947, and before January 1, 1950, the taxpayer has a net operating loss, such net operating loss shall be a net oper-

ating loss carry-over for each of the three succeeding taxable years * * *.

* * * *

(26 U.S.C. 1952 ed., Sec. 122.)

SEC. 145. PENALTIES.

* * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 1952 ed., Sec. 145.)

Internal Revenue Code of 1954:

SEC. 172. NET OPERATING LOSS DEDUCTION.

(a) *Deduction Allowed.*—There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

perating Loss Carrybacks and

(b) *Net Opera*
Carryovers.— *rs to which loss may be carried.*
perating loss for any taxable year
(1) *Years*
er December 31, 1953, shall be—
—A net opera
ending after
a net operating loss carryback
h of the 2 taxable years preceding
(A) a
xable year of such loss * * *.
to each of
the taxab
* * * *
* *Transitional Rules.—*
(g) *Special Tra*
* * * *
sses for taxable years ending after
31, 1953.—For purposes of sec-
(2) *Losses*
of the Internal Revenue Code of
December 31,
tion 122 of t
1939—
) the determination of the tax-
years ending before January 1,
(A) th
to which a net operating loss for
able year
axable year ending after Decem-
1954, to
1, 1953, may be carried shall be
any taxa
under subsection (b) (1) (A)
ber 31, 1
is section * * *.
made und
of this se
* * * *
* 2.)

(26 U.S.C. 172.)

STATEMENT

STA
onvicted on two counts of an in-
Petitioner was convic
charging him as president of the
dictment (R. 8-9) char
Transportation Company with the
Gulf Southwestern Tran
evade that company's 1952 and
wilfull attempt to evad
Petitioner was fined $5,000 on
1953 income taxes. Pe

Count two and sentenced to a term of imprisonment of thirty-six months on each count, the sentences to run concurrently. (R. 203-204.)

1. For several years prior to November 20, 1950, the Gulf Southwestern Transportation Company was engaged in the business of a truck carrier, operating under a certificate of public convenience and necessity issued by the Interstate Commerce Commission. The court of appeals assumed, in accordance with petitioner's assertion, that during 1949 and 1950 the company had suffered substantial losses, as it had in prior years. As a result of these losses, the company filed a petition in the bankruptcy court for reorganization under Chapter X of the Bankruptcy Act. This was followed by the filing of a plan of reorganization which was accepted and made operative by an order of the district court on November 20, 1950. Under the plan, the corporate shell remained and its I.C.C. certificates continued to be effective, but its capital structure was modified. Petitioner who was not a previous stockholder, became the new owner of the entire stock of the company. The plan of reorganization called for the minority stockholders to surrender their stock, and for a Mr. Culbertson to retain his stock, which was to be purchased by petitioner. Petitioner was to pay a sum which Culbertson agreed would be used to pay certain preferred claims against the company, a percentage of other claims, including the Government's claim for taxes, and ten percent on the claims of ordinary unsecured creditors. All other debts of the company were wiped out under the plan of reorganization.

The capital structure was further modified in part by the provision in petitioner's contract to purchase the stock at a minimum price, which was to be five per cent of the corporation's gross revenues from future operations, whether or not those operations were profitable.

2. In the district court, there was testimony that petitioner "had wilfully set up fictitious expense deductions on the books of the company of which he was president * * * [and] undisputed evidence that the false and fictitious entries resulted in defeating the government in collecting part of the tax shown on the return to be due during * * * [the prosecution] years" (Pet. App. 22). As a defense, petitioner sought to prove that the corporation was entitled to carry over losses incurred in 1949 and 1950, prior to its reorganization in bankruptcy, and that, if it had in fact done so, the corporation would have had no deficiency for 1952 or 1953 (Pet. App. 24). Petitioner also sought to show that the corporation was entitled to a 1955 carry-back loss which would offset the deficiency for 1953 (Pet. App. 30). The district court rejected petitioner's offer of proof with respect to the pre-bankruptcy losses (R. 155) and also rejected petitioner's contention with respect to the carry-back (R. 129, 148).

3. On appeal, petitioner did not "contest the sufficiency of the evidence to sustain a jury's verdict of guilty" with respect to the fictitious expense deductions (Pet. App. 21-22), but only raised the issues with respect to the loss carry-over and carry-back deductions. The court of appeals unanimously re-

jected petitioner's contentions and affirmed the judgment of conviction (Pet. 21-32).

ARGUMENT

Petitioner's conviction for the wilfully attempted evasion of corporate income taxes for 1952 and 1953 was based on evidence that he had wilfully set up fictitious expense deductions on the corporation's books (see the Statement, *supra*, p. 7). In sustaining the conviction, the court of appeals concluded—contrary to the only contentions raised by petitioner either below or in this Court—(1) that the claimed 1949 and 1950 loss carry-overs did not affect, as a matter of civil tax law, the liabilities of Gulf Southwestern for the subsequent prosecution years, and (2) that the existence of the claimed 1955 loss carry-back was irrelevant to the question whether petitioner had wilfully attempted to evade and defeat corporate taxes for 1953. There is no conflict in the circuits, and this case is not one which merits further review.

1. *The carry-overs.* (a) Petitioner relying on *Koontz* v. *United States*, 277 F.2d 53 (C.A. 5th), claims that a prosecution under Section 145(b) of the 1939 Code cannot be supported unless there is some tax due. He therefore urges that the income of Gulf Southwestern for 1952 and 1953 should be reconstructed because the corporation suffered net operating losses in 1949 and 1950 which, if carried over under provisions of Sections 122(b)(2)(B) and (C) of the Internal Revenue Code of 1939 (*supra*, pp. 3-4), would offset the additional income alleged

in the indictment to be owing for 1952 and 1953. Sections 122(b)(2)(B) and (C) permit a net operating loss deduction by way of carry-over to "the taxpayer [who] has a net operating loss."

In answer to petitioner's contentions, the district court concluded that Gulf Southwestern, after its Chapter X reorganization on November 20, 1950, was not the same "taxpayer", in the statutory sense, which had suffered the pre-reorganization losses, and that therefore the losses could not be carried over into the post-reorganization years (see R. 155). On the basis of the facts set out in Part 1 of the Statement (*supra*, pp. 6-7), the court of appeals similarly concluded that petitioner had so identified himself with the post-reorganization corporation as to make it " * * * a completely different corporate person than when it was incurring the losses here sought to be carried forward" (Pet. App. 29). Furthermore, the court of appeals found that the business carried on after the reorganization was "by a corporation having entirely new stock ownership and with an entirely new corporate structure" (Pet. App. 28), and that " * * * except for the uninterrupted corporate existence under the state charter, the taxpayer that commenced operations on November 20, 1950, was * * * a new business enterprise" (Pet. App. 29). Since the carry-over provision was "designed to permit a taxpayer to set off its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year" (*Libson Shops, Inc.* v. *Koehler*, 353 U.S. 382, 386), and since the carry-over provision was

never intended "to make the right to the deduction transferable or available to others than the taxpayer who sustained the loss" (*New Colonial Co.* v. *Helvering*, 292 U.S. 435, 441), the court of appeals held that a loss carry-over deduction was not available to the post-reorganization corporation for the prosecution years (see Pet. App. 30).

(*b*) Even though there may be room for argument as to the reach of this Court's ruling in the *Libson Shops* case, *supra*—which involved the loss carry-over provisions of the Internal Revenue Code of 1939—the issue decided in that case is hardly one which demands further consideration in the absence of a conflict. This is particularly so in view of the fact that the loss carry-over provisions of the Internal Revenue Code of 1954 (Section 381, 382) have radically revised the earlier statutory provisions and have significantly altered the criteria of decision. See H. Rep. No. 1337, 83d Cong., 2d Sess. (3 U.S.C. Cong. & Adm. News 4017, 4066-4067, 4281-4283 (1954)); S. Rep. No. 1622, 83d Cong., 2d Sess. (3 U.S.C. Cong. & Adm. News 4621, 4683-4684, 4922-4925 (1954)); H. (Conf.) Rep. No. 2543, 83d Cong., 2d Sess. (3 U.S.C. Cong. & Adm. News 5280, 5299-5300 (1954)).

(*c*) Finally, petitioner's claim of a loss carry-over deduction as a defense in his prosecution for tax evasion is especially inappropriate for review by this Court in the circumstances of the present case. So far as the record shows, prior to petitioners' trial, Gulf Southwestern Transportation Company had never made any claim for refund based upon the loss

carry-over deductions asserted here. The tax returns which contained the fraudulent deductions were filed on March 14, 1953, and March 16, 1954, respectively (R. 27-28), and the amounts shown to be due thereon were paid (R. 30-32). Section 322 (b)(1) of the 1939 Code and Section 6511(a) of the 1954 Code require that any claim for refund of an asserted overpayment be made within three years after the filing of the return or within two years after payment, whichever of such periods expires later. Thus, when petitioner, at his trial in 1960, first asserted that the company had no actual deficiencies in 1952 and 1953 because of its right to loss carry-over deductions, the statute of limitations had already run on the claims for those years.

This conclusion is bolstered by the position taken by the corporation in a current Tax Court proceeding (Docket No. 89847). On August 5, 1960, the Commissioner asserted deficiencies against the company for 1952 and 1953, as well as for other years. In the very first assignment of error in its Tax Court petition, the company maintained that the Commissioner was barred from asserting a deficiency for 1952 and 1953 by the three year statute of limitations in Section 275(a) of the 1939 Code and Section 6501(a) of the 1954 Code. As an alternative assignment of error, the company claimed the right to deduct loss carry-overs only in "the calendar years 1950, 1951, and 1952 or until the loss carried forward is absorbed by income, whichever is first." The company did not claim a loss carry-over to 1953, the year covered by count two of petitioner's indict-

ment. Thus even if the company were entitled to a loss carry-over for 1952 (which it claimed in the Tax Court), but not for 1953 (which it did not claim), petitioner would still be subject to the same punishment in the present case, since he was sentenced to a term of three years imprisonment on count one (1952) and a *concurrent* term of three years plus a $5,000 fine on count two (1953). See, *e.g.*, *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Claassen* v. *United States*, 142 U.S. 140, 146.

2. *The carry-back.* Further review by this Court of the issue with respect to the loss carry-back deduction—as distinguished from the loss carry-overs—is also unwarranted because the court of appeals correctly held that petitioner's wilfully attempted evasion of corporate taxes for 1953 was completed when the return for that year was filed (See *Spies* v. *United States*, 317 U.S. 492, 498-499) and that any subsequent adjustment for civil tax purposes because of the fortuitous 1955 loss would not vitiate the previously matured criminal "attempt" prohibited by Section 145(b) of the 1939 Code (*supra*, p. 4). See, also, *Goo* v. *United States*, 187 F. 2d 62 (C.A. 9th), certiorari denied, 341 U.S. 916; *United States* v. *Tusan* (S.D. Calif.), decided September 4, 1952 (53-1 U.S.T.C., par. 9168); cf. *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561, 566.[1]

---

[1] *Elwert* v. *United States*, 231 F. 2d 928, 933 (C.A. 9th), relied upon by petitioner (Pet. 12), presents no conflict in principle. In holding that the taxpayer-defendant in that case was not entitled to a carry-back, the court observed, correctly as a matter of civil tax law, that if the taxpayer had been entitled to the carry-back "the amount of taxable

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

MEYER ROTHWACKS,
KENNETH E. LEVIN,
Attorneys.

AUGUST 1961.

---

income for * * * [the earlier years] could be affected." The court did not hold that such an effect would vitiate the conviction. Other decisions relied upon by petitioner (Pet. 11) are not apposite in that they do not involve loss carry-back situations.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 606147 255